



**SCOTTSDALE BOARD OF ADJUSTMENT
STUDY SESSION
KIVA - CITY HALL
3939 N. DRINKWATER BOULEVARD
OCTOBER 8, 2003
5:00 PM
APPROVED MINUTES**

PRESENT: James Vail, Chair
Terry Kuhstoss, Vice Chair
Carol Perica, Board Member
Norman Sands, Board Member
Neal Waldman, Board Member
Laurel Walsh, Board Member

STAFF: Pat Boomsma
Kroy Ekblaw
Randy Grant
Kurt Jones
Jayna Shewak

CALL TO ORDER

The study session of the Scottsdale Board of Adjustment was called to order by CHAIR VAIL at 5:00 p.m.

ROLL CALL

A formal roll call confirmed members present as stated above.

DISCUSSION ITEMS

1. Administrative Items a. Staffing Changes

CHAIR VAIL: On the study session agenda tonight we have discussion of administrative items and staffing changes, discussion of possible changes to the rules of procedure and by laws, and discussion of items on the regular agenda. I would remind the public that the study sessions are for the benefit of the board. Everyone in the audience is certainly welcome to observe, but unfortunately not participate. Full opportunity for participation will be at the regular meeting, which we hope to start at 6 o'clock. Thank you.

Mr. Jones, did we want to go over the administrative items and staffing changes or not. With time constraints would you prefer that we go straight to the item on the regular agenda?

MR. JONES: Mr. Chairman, Members of the Board, we will start with that Sub Section One, which is staffing changes, and that is something that Pat Boomsma, our City Attorney, will address.

PAT BOOMSMA: Chair Vail, Members of the Board, my name is Pat Boomsma. I'm an Assistant City Attorney with the City of Scottsdale and some of you recognize me from my tenure with the Board a few years ago. We are having some staffing changes within the City Attorney's Office, and it will now be and my responsibility to provide legal advice to this Board. So I wanted to introduce myself to you, and also to raise an issue that we are discussing internally, just for you to think about and to send me any comments that you have about it. Several of our boards have legal representation only on an as-needed basis.

Now the tradition has been to have a city attorney here at every meeting and the thought is change that, and when you have routine matters – and I would not call tonight's meeting a routine matter – so there would still be legal representation at a meeting like tonight, but for routine variances, where you are doing the same kinds of things that you always do, if you had questions ahead of time you could call me. If you needed a memo on a particular topic, you could ask me for that. But as far as attendance at the meetings, that would only happen on an as need basis. I wanted to raise the issue with you, and I know you have a full agenda tonight and maybe don't want to talk about it right this second – of course, we can if you would like to. Otherwise I will move onto another portion of the agenda. I think you all have Janis' number so the same number applies to me, if you want to call me about any issue at all.

COMMISSIONER PERICA: It seems to me that at every hearing we have utilized the advice of counsel, even on more routine matters. I think it would hurt us if we did not have counsel available at the meetings.

VICE-CHAIR KUHSTOSS: Welcome back. Glad to have you, and I am in agreement with Commissioner Perica. Every meeting we have had, despite having attorneys on the Board, we have needed input from legal counsel. So I, for one, would feel more comfortable having counsel present at meetings.

COMMISSIONER WALSH: This is my last night on the Board, so I'm not sure how relevant my comments are, but I would have to agree with their comments. Over my six years tenure on the Board, it has been very rare that we haven't required counsel, whether it's in the form of a motion or to remind us of a procedure. And this is a quasi-judicial board, and I think requires the support and strength of an attorney present.

CHAIR VAIL: I would echo all the remarks. I realize the constraints of the budget the City is facing, but I think our immediate past Chair, Commissioner Walsh has really touched on the issue. We are not an advisory board to City Council, but our decisions are final and the only appeal from our decision is through the Maricopa County Superior Court. I cannot recall in my years of tenure on this Board, one meeting where we did not have legal advice. I would certainly hope that perhaps the city attorney's office could revisit this decision. Thank you.

MS. BOOMSMA: I will convey your comments to the City Attorney. I think instead of discussing the possible changes to the Rules Of Procedure, if we move to the discussion of the only item on the regular agenda, it will probably be better, in case it gets more complicated than we think it will.

2. Discussion of possible changes to the Rules of Procedure/By-Laws

COMMISSIONER WALSH: I just wanted to make one comment, since I won't be around, and am, I think, the only member of the Board involved in the last changes of the Rules Of Procedure. And so I would just like everybody to take under advisement that we changed the length of the preliminary session to one hour because we found when we had cases with any kind of complicated discussion, we didn't have enough time with a half hour study session. And while we have had light cases lately, I suspect, and a classic case would be today, that we would need an hour study session. When I read the proposed changes, I think that a half hour Study Session could be too restrictive and unfair to the cases being presented to the Board. I just wanted that as a matter of record, because I wouldn't have input later.

CHAIR VAIL: I agree with you. If there's no other discussion on any of these administrative items or rules changes, I would take Ms. Boomsma's advice and move to a discussion of the items on the regular agenda tonight. That is 7-BA-2003.

3. Discussion of item(s) on the regular agenda

CHAIR VAIL: Are we prepared for some questions for staff, or would you like to make a brief presentation for the Study Session as well as what we'll expect at the regular meeting?

MS. BOOMSMA: Chair Vail and Board Members, I would like to raise a couple of procedural issues which you will ultimately determine at the Board meeting itself, but there's a number of issues that have been raised through various correspondences, and some of the things that have been filed with you that are at least worth considering in a little more detail during the Study Session. They are primarily procedural issues. One of the first things I would like to talk about is the need to decide the case tonight based on the evidence presented at the hearing, and that includes the material that has been submitted to you ahead of time. You have several rules: Number 402, 501, 502, and 503 that address the issue of relying on evidence presented at the hearing as opposed to outside of the hearing. The first one talks about submission of evidence and written material.

One of the issues that has come up; all of you got a packet from staff and a notebook from each of the attorneys involved in this case: Ms. Lagarde and Mr. Lazarus, and they all contain quite a bit of material. And all of that is before you as evidence tonight. And there have also been a number of correspondences since then, and your rules are pretty specific that you don't accept those. But there has been a request that you do accept some of the late-filed material. And we have collected that material. Mr. Jones has copies of it. So one of the first things you need to decide is whether or not to accept the late-filed material or not, or to require that anything that is contained within that material be done orally at the hearing.

The purpose of that rule, and as Commissioner Walsh points out, that was in the last series of amendments, was so that you would not be deluged with a lot of written material that you wouldn't have time to read. On the other hand, most of the information that has been presented since then, is not very long because everyone complied with the eight-day rule and submitted the large packets ahead of time. So that is within your discretion, whether you want to waive that rule or not.

The next three rules, 501, 502, and 503 are talking about ex parte communications. And the point of that rule is to make sure that everyone hears the same evidence and makes the decision based on the same evidence. So all I would like to point out to you about that is that if anyone had conversations with anyone outside of this hearing, you need to disclose it so that the other side or so that the rest of the commissioners can have the benefit of that. I am not going to read the rule to you, I'm guessing that you all have, but am guessing that if you all have any questions about the basic concept now is the time to talk it out.

CHAIR VAIL: Thank you. Are there any questions?

COMMISSIONER WALSH: I don't have questions. I just have comments, and don't know if we're going to discuss at this point the late-filed material issue or not.

CHAIR VAIL: I think if we are going to accept it now is the time to accept it.

COMMISSIONER WALSH: Can we make a decision to accept late-filed material or not in a Study Session? I doubt that we can, can we, Ms. Boomsma? I think we would have to have a vote, which would have to be in a public meeting

MS. BOOMSMA: I'm inclined to say that you need to wait and take an actual vote during the meeting. And the other thing I neglected to mention was, you did have a special aspect of this hearing at the site where there was consideration of the noise associated with the uses at issue tonight and that also is considered evidence at this hearing. Now one of the problems is, not everyone on the Board was able to attend that particular hearing, so you will need to consider the weight of that and maybe discuss that amongst yourselves during the discussion part of the hearing.

COMMISSIONER WALSH: Then I would like to make a comment. Because we have many new members of the Board and I was one of the principal authors of the eight day advance submittal when we went into the rule changes and I found that at the time, when we had hearings and accepted materials it was too difficult to try to ferret out, in an ongoing meeting, the philosophic intent behind the communication, and to give it fair weight, and so the thought process was, if we received it and had a full weekend before hand that we had plenty of time to give it fair attention and, if everybody knew the rules, that we had had plenty of time. My only suggestion is that there's nothing to prevent the people that submitted the information to show it before us and make us listen to it and read it and then give it adequate fair hearing, but given the length of the discussion I think we might have, it would be very hard for me to want to get some quick written material, give full credence to whoever is addressing me, and then trying to read it below, since we can't make a decision on it until the meeting occurs.

CHAIR VAIL: Particularly since that can't happen until the meeting occurs – and I was part of that. I would be opposed to it and if the Chair could exercise prerogative, I think it would be unfair to people who are making presentations for us to be reading through materials while the meeting is underway. My inclination would be that we would not accept anything. Our rules have been pretty clear and they have been on the books for several years. Three years, I think, since we last rewrote those. So the inclination would be that Ms. Frey could just hold those packets and not distribute them to the Board.

COMMISSIONER WALSH: They could use their three minutes to have it presented to us as a body. I don't want it not to be available. I just don't want to have to scramble to read it at the last minute and not have time for a fair hearing.

CHAIR VAIL: I think that was the intent when we rewrote those rules, was that everyone could certainly present it. Try not to be handed a sheaf of documents at the meeting, or two minutes just before the meeting. It's not fair to anyone, to the Board or to the applicant. Are there any further comments on that issue?

VICE-CHAIR KUHSTOSS: I was part of the group that put in the rule. Actually, I wanted a longer period so we that we would all have the materials ahead of time so we could actually study them. And every time this situation has come up we have denied the people the right to present last minute type things. It doesn't give the people who are trying to give us the information as much credence, with us trying to scramble through things at the last minute. I think we have been overly indulgent in allowing eight days as opposed to a longer period, particularly when we have a month's notice that something is going to happen. So you have minimally a month's notice to get these things in and so I would be very, very reluctant to allow last minute submittals.

CHAIR VAIL: Any further questions on this topic? Hearing none, we will move on.

MS. BOOMSMA: The next issue is... There is an issue raised in tonight's meeting about the jurisdiction of the Board. So I have put up your rules. There's also State statute controls. The issue that the rule addresses is the order. One of the proposals in one of the late- filed letters is that the case be divided up into first addressing the jurisdictional issues, and secondly addressing the merits of the case. And the last time I was in a hearing with this Board, that's exactly what we did.

The first thing that the Board considered, and I think the rule supports that, is consideration of the scope of your jurisdiction. So that the presentations can be geared towards what you have jurisdiction over. I am not going to go into what I think your jurisdiction is. We have three attorneys involved here, and all three of us have different opinions. And we will present that to you at the hearing. But the suggestion has been made. I agree with it, I didn't sign the joint proposal, but I agree that probably the best approach for you to take is to hear the jurisdictional arguments. And you can decide whether to take public testimony on the jurisdictional arguments or not, but it's really a legal question.

So you can choose to take public testimony on it or not. I don't believe that the rule requires it. I don't believe that the law requires you to take public testimony on that. If you want to hear the arguments you can and decide for yourself if you want to hear other discussions of it, but once the decision is made as to the scope of your jurisdiction, then we move into the merits of the case and we will all have to gear our presentations around that and we may be

scrambling a little at that point. But that's the proposal. It's within your discretion whether you want to do it that way or not.

CHAIR VAIL: Yes, I agree that we have done that in the past. Very recently, within the past couple of months we had a case where we first decided if there was a material change for us to rehear a case. So I certainly think that's the only proper way for us to proceed. We will go with Part A and Part B, first determining the Board's jurisdiction over the issues, and having decided that affirmatively, should that happen, we will then determine the merits of the issue. Any further discussion on that particular topic?

VICE CHAIR KUHSTOSS: I don't think it's a question of whether we have jurisdiction or not. I think it's a question of how much jurisdiction we have or don't have. I personally view the situation as, this is basically an appeal from the July 25 2003 letter from the Zoning Administrator and I believe that defines our jurisdiction. If we assume that we have jurisdiction to do this, which I believe we do. Because it is a statement by the Zoning Administrator, so it is not just a question of whether we have jurisdiction, but a question of how far we have jurisdiction.

CHAIR VAIL: Thank you. Any other comments? Hearing none, we will proceed.

MS. BOOMSMA: The next issue is the order of presentation. We have an unusual case here, in that the person appealing the Zoning Administrator's interpretation is a member of the staff. That's allowed under the rules. The applicant actually is Jayna Shewak, as a member of the planning department affected by the determination. But there are two other parties. There are many other people interested. But there are two other essential parties, one is the property owner, and the other is the person who wrote the letter requesting the interpretation in the first place. So we have three parties in this case. You have received packets of information from all three and the question will come as to how we comply with the Board's rule as to order of presentation.

I have a proposal. You can choose to follow it or not. My proposal would be, as staff for the Board, I would raise the procedural issues at the beginning of the hearing, move to a presentation of just the bare facts from Ms. Shewak, and then a discussion of the jurisdictional issues. I would go first, as a member of staff, and then you could choose whether to allow Mr. Heitel's counsel, or the property owners counsel to go first at your discretion. And then the question comes up of how much time to give each person. As you see under the rules, you have the authority to establish time limits.

A request has been made by the property owner's attorney and Mr. Heitel's attorney to give 10 minutes to each person for the jurisdictional issue, and 20 minutes on the merits of the case, and that's acceptable to me. But that's within your discretion what to do about that. And also there is the issue of public testimony. I think there's a distinction to be made between

persons testifying as to facts, basically as evidence, and persons testifying as to basically public opinion. I don't know if you want to make that distinction or not and give different time limits for the different kind of person who's testifying, or if you want to stay with the traditional three minutes for anyone other than the persons representing the parties in this case. But that's another issue you need to consider and that's within your discretion.

You can see how we have public testimony and then rebuttal. There would be an issue as to how much time for rebuttal you want to allow. And I believe everyone here would like to know that at the outset so that they can gear their presentations to conform to whatever you decide. I don't think we need to decide in Study Session, but it is worth talking about at this point.

CHAIR VAIL: I have communicated to the attorneys, through staff, that I would extend the time that I would allow for their presentation. My feeling in making that decision was that we would be better to err on the side of allowing too much time rather than to make it too brief. And I will compensate for that by not allowing any trading off of minutes. In other words, if someone in the audience says, "I will give my three minutes to another person", I won't permit that. But I will allow an extended period of time for the attorneys to make a presentation. Any further comments on that?

COMMISSIONER WALSH: If we could go back to the order, I would appreciate clarification from the Chair because, again, we may have time constraints here. At which point in our order will questions by the Board and comments by the Board be appropriate, as the attorneys are presented. I wonder if we shouldn't try to have some order to our questions and commentary.

CHAIR VAIL: I thought that once the presentation is made, as we normally do, we would allow the Board to question, for example, the staff goes first. Then the attorney representing the neighbors would speak and we would ask questions of that person, and the attorney representing the land owner would speak – not necessarily in that order - and after each presentation I would think the board would be better prepared to ask questions at that time.

COMMISSIONER WALSH: At some point it may be that the presentation of one of the attorneys may jog a question that we would like to ask of the first attorney and I think little light bulbs would go off at different points, and I was just concerned about the appropriate time as to when you would like us to redress questions from some commentary or rebuttal. Would it be after rebuttal by everyone, or is there a time when we might have a chance to say, ask in a thoughtful manner what they feel on a certain point that might arise.

CHAIR VAIL: I would say that would be a good time, again as you say, the memory might be jogged by the rebuttals. Again do it in order. After staff makes a rebuttal, we would ask questions of staff. After the next presentation, we would ask questions then. So we would give the board two opportunities for each presentation.

COMMISSIONER WALSH: I don't know that that would happen, but I might like, after all presentations, to have an opportunity to ask a question of the first speaker. That's all I'm asking for. I just don't know what might strike....

CHAIR VAIL: Right. And again, we have done that in past cases as recently as two or three months ago. We have done that.

COMMISSIONER WALSH: So I will save my cross questions until after all rebuttals.

CHAIR VAIL: That's fine. Any questions on that procedure?

VICE CHAIR KUHSTOSS: I believe we should limit the jurisdictional argument to 10 minutes apiece, and the main issues to 15 minutes apiece, and the rebuttals to 5 minutes apiece. We have gotten an extensive amount of paperwork. We have all reviewed it, and I don't see any purpose in having it orally presented again repetitively in front of us today. And I also believe we should limit any nonparty to 3 minutes, regardless of what their stance is. Because I don't think they can make that distinction before they get up and start talking.

CHAIR VAIL: That is essentially what I had proposed: 10 minutes – then 20 minutes rather than the 15 that you suggested. And I reiterate again that public comments will be limited to 3 minutes. Anything further on this issue? If not, Attorney Boomsma, again.

MS. BOOMSMA: Chair Vail and Board Members, would you like a short presentation about the case, or hold off on that until the Board meeting itself?

CHAIR VAIL: Does the Board have feelings on that? Would you like to go through this twice?

COMMISSIONER WALDMAN: I would like to hear counsel give a brief synopsis of the case during this Study Session.

COMMISSIONER PERICA: I feel comfortable with every thing I have read.

COMMISSIONER SANDS: I can do with what I have read.

VICE CHAIR KUHSTOSS: I have read a lot, and I am comfortable with what I have read.

CHAIR VAIL: I also agree, with all due respect, that the Board will hear plenty at six.

COMMISSIONER WALSH: I feel that I have adequately studied, and am expecting, as I said, to have lots of light bulbs go off. I would prefer to wait.

CHAIR VAIL: I think again, and we usually do it, and I understand your position, but I think in the light of what we expect to hear, we will probably be fine. Other comments? Thank you.

We will also include tonight the swearing in of anyone who will testify: attorneys, public, neighbors for or against, staff, everyone who will testify. I will ask that you swear in, and we will do a mass swearing in. Anything else?

MR. JONES: Mr. Chair and Members of the Board, the only other item on your agenda is the administrative items. Depending on the timing this evening, it would be up to the Board. We could either get into those rules changes, or we could recommend a continuance to another night.

CHAIR VAIL: Thank you very much.

MS. BOOMSMA: Chair Vail and Members of the Board, the reason that we brought the rules and procedure amendments to this hearing is that you have a rule that we need two meetings to discuss them, so the purpose of bringing the proposed changes at this hearing is to present them for the first time, allow you to talk about them, if you wish to. At least that they are presented and members of the public have an entire month to think about them. And if we have sufficient time at the hearing tonight, we can discuss them, but if it goes very late and the decision is made not to, we can just raise the issue and consider it for the month and then just bring it up next month for a full discussion.

CHAIR VAIL: Very good. I agree with the time constraints. I was also somewhat concerned that two of the Board Member's terms expire. One is open for renewal, but Commissioner Walsh will not be with us. So it might behoove us to wait so that the new member, or new members, are aware of the changes made.

We will reconvene at six o'clock for the open meeting.

(The study session was adjourned at 5:36 pm)